lands of intermediate owners to the plaintiff's woodland two miles away. A judgment for the plaintiff was reversed in the Court of Appeals on the ground that the injury was not the proximate result of the defendant's negligent act, it not being a foreseeable consequence that the fire would spread beyond abutting lands, and the drought, atmosphere and wind being intervening causes of the damage. *Hoffman* v. *King et al.*, 55 N. E. Rep. 401 (N. Y.).

By the overwhelming weight of authority the defendant would be held liable in this case. *W. & St. P. R. R. Co.* v. *Kellogg*, 94 U. S. 469; 1 Shearman and Redfield on Negligence, § 30, 5th ed. And on principle it would seem that a recovery should be allowed. To incur liability for a negligent act, it must be the proximate and not the remote cause of the injury. It is everywhere granted that any injury which is the natural and probable consequence of the negligence is deemed proximate, provided no independent agency has intervened. Nor can the drought and high wind be considered as intervening causes. They are merely conditions surrounding the act at the time of its performance. Hence they really form part of the defendant's tortious act, for negligence is the failure to use due care under all the attendant circumstances. Clearly, therefore, a jury might have found that such an injury was reasonably foreseeable, that is, natural and probable. *Fent* v. *T. P. & W. R. R. Co.*, 59 Ill. 349. Nor can mere diversity of ownership make any difference; for there is no logic in saying that the probability of a certain tract of land being injured by the defendant's negligence is determinable according as it is owned by one person or by several. The argument that this extent of liability might result in the ruin of the defendant is answered by saying that there is more justice in letting a wrongdoer be ruined by his negligence than in allowing him by it to bring ruin upon other and innocent persons. See *Hoyt* v. *Jeffers*, 30 Mich. 181. The decision in the principal case, therefore, while consistent in a New York court, would seem to be unsupportable on grounds either of principle or expediency.

RECENT CASES.

ADMIRALTY — FORFEITURE — DEGREE OF PROOF. — In a proceeding by the government for the forfeiture of a vessel, because of a violation of her license by carrying smuggled goods, *held*, that the prosecution can prove its case by a preponderance of the evidence. *The Good Templar*, 97 Fed. Rep. 651 (Dist. Ct., Mass.).

This decision is opposed to the authorities and seems questionable upon principle. The proceeding, though civil in form, is clearly criminal in its nature, being instituted by the government in order to punish a breach of its laws. The government should therefore be obliged to prove its case beyond a reasonable doubt. Such is the view adopted by two previous decisions in the federal courts. *United States* v. *The Burdett*, 9 Pet. 682; *United States* v. *Shapleigh*, 12 U. S. App. 26. In a similar class of cases, where a suit is brought to recover a statutory penalty, the uniform rule is that the defendant is within the constitutional guaranty in criminal cases, and cannot be compelled to testify against himself. *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476.

AGENCY — REVOCATION — TIME OF TAKING EFFECT. — After a letter revoking the plaintiff's authority to sell stock had been delivered at the plaintiff's usual place of business, but before it had come to his knowledge, the principal sold the stock to persons with whom the plaintiff had previously negotiated. *Held*, that the plaintiff cannot

recover commission, since the determination of the agency, without fraudulent purpose prevented his fulfilling his side of the contract. *Rees* v. *Pellow*, 97 Fed. Rep. 167 (C. C. A., Sixth Cir.).

The precise line of reasoning is difficult to ascertain, but it seems clear that the court intended to lay down the proposition that here the agency was terminated by the delivery of the revocation at the plaintiff's usual place of business. Although judicial decision on this exact point is lacking, it has been said that a revocation only takes effect when it is made known to the agent. Story, Agency, 9th ed., § 479. But a revocation does not require mutual assent, and it is hard on the principal to require that he should do more than accomplish all things reasonably necessary to put the revocation in the power of the agent. Such reasoning has been applied in regard to the revocation of a reward. *Shuey* v. *United States*, 92 U. S. 73. Hence the view of the principal case on this point seems proper. But it may be questioned whether the decision might not have been placed on the simple ground that, whether or not the agency was terminated, the facts did not show the plaintiff's instrumentality in bringing about the final contract. *Wylie* v. *Marine Nat. Bank*, 61 N. Y. 415.

BANKRUPTCY — DISSOLUTION OF LIENS — VOLUNTARY AND INVOLUNTARY CASES. — *Held*, that a levy of execution upon personal property within four months is dissolved by the adjudication of the debtor as a voluntary bankrupt. *Re Vaughan*, 97 Fed. Rep. 560 (Dist. Ct., N. Y.).

The Bankruptcy Act of 1898, § 67 f, provides that all levies against a debtor "four months prior to filing of a petition in bankruptcy against him" shall be void. Upon a literal construction of this provision, some courts have held that it applies only to cases of involuntary bankruptcy. *Re De Lue*, 91 Fed. Rep. 510 (Dist. Ct., Mass.); *Re Easley*, 93 Fed. Rep. 419 (Dist. Ct., Va.). But upon a broader construction of the section, other cases have held that it applies to both voluntary and involuntary bankruptcy. *Re Brown*, 91 Fed. Rep. 359 (Dist. Ct., Va.); *Re Richards*, 95 Fed. Rep. 258 (Dist. Ct., Wis.). The latter cases are supported by section 1 (1) which provides that "a person against whom a petition has been filed shall include a person who has filed a voluntary petition." Moreover, the former construction is a manifest subversion of the policy of the act, which is to prevent preferences and secure an equal distribution of the assets, whether the bankruptcy be voluntary or involuntary. Accordingly the principal case is to be commended.

BILLS AND NOTES — ACTION BY INDORSEE — TIME OF INDORSEMENT. — In a suit on a promissory note it appeared that the plaintiff was merely the assignee of the note at the time of bringing the action, but that the note was indorsed to him before the trial. *Held*, that the action cannot be maintained. *Burch* v. *Daniel*, 34 S. E. Rep. 310 (Ga.).

This case follows the general rule that the plaintiff must have the legal title to the note in suit at the time of action brought. *Vila* v. *Weston*, 33 Conn. 42; *Dowell* v. *Brown*, 21 Miss. 43. It is true that the plaintiff, as in the principal case, may be the real party in interest without having the legal title; but whether or not he is a holder in due course, and thus what defences are open to the maker, depends upon the date of the indorsement. *Whistler* v. *Forster*, 14 C. B. N. S. 248. It is, therefore, a substantial reason for the general rule that, if the plaintiff is allowed to found his action on an indorsement before the date of the writ and rely on a later one at a trial, he may work a surprise on the defendant and deprive him of the opportunity of establishing a valid defence. It has been held, however, in some cases, that an indorsement at any time before the trial is sufficient. *Brown* v. *McHugh*, 35 Mich. 50; *Weeks* v. *Medler*, 20 Kan. 57.

BILLS AND NOTES — DISCOUNT AT USURIOUS RATE — AMOUNT OF RECOVERY. — The plaintiff discounted notes for the defendant, taking out interest at a usurious rate. *Held*, that the transaction imports a sale, which is not affected by the usury statute, and the plaintiff can recover the amount advanced, with legal interest. *Cook* v. *Forker*, 44 Atl. Rep. 560 (Pa.).

This decision is supported by the weight of authority. *Cram* v. *Hendricks*, 7 Wend. 569; *French* v. *Grindle*, 15 Me. 163. Several courts, however, hold that such a transaction, owing to the indorser's conditional liability, is in substance a loan, and is made unenforcible by the statute of usury. *McElwee* v. *Collins*, 4 Dev. & Bat. 259; *Cowles* v. *McVickar*, 3 Wis. 725. The question is really one of fact, whether the parties intend a *bona fide* sale of the notes, or merely adopt this form in order fraudulently to avoid the statute. *Nichols* v. *Fearson*, 7 Pet. 103; *Belden* v. *Lamb*, 17 Conn. 441. When there is no evidence of fraud, the view taken of the transaction in the principal case seems the more reasonable and just. As to the amuont of recovery, however, the

decision is hardly to be supported, since the liability of an indorser, as of any surety, is to pay the full amount of the obligation. This latter view has considerable support in the authorities. *Roark* v. *Turner*, 29 Ga. 455; *National Bank of Michigan* v. *Green*, 33 Iowa, 140.

CARRIERS — LOSS OF BAGGAGE — LIABILITY OF STEAMSHIP COMPANIES — *Held*, that, unless negligence is shown, a steamship company is not liable for baggage stolen from a passenger's stateroom. *The Humboldt*, 97 Fed. Rep. 656 (Dist. Ct., Wash.).

The case is supported by the great weight of authority. *Clark* v. *Burns*, 118 Mass. 275; *American Steamship Co.* v. *Bryan*, 83 Pa. St. 446. The contrary New York doctrine is based on the idea that a passenger steamboat is in effect a floating inn, and should, therefore, be subjected to the absolute liability of an innkeeper. *Adams* v. *New Jersey Steamboat Co.*, 151 N. Y. 163; *Macklin* v. *New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. 229. The reason for the strict liability of an inkeeper is the purely historical one that in olden times inns were sought chiefly for protection. No such reason applies in the case of steamboats, and it is more in accord with the dictate of justice and the tendency of the modern law to restrict the rule as to innkeepers' liability to its original limits. The New York doctrine has not been extended to the case of sleeping car companies even in New York state. *Carpenter* v. *New York, etc. R. R. Co.*, N. Y. 53; 124 *Pullman Palace Car Co.* v. *Smith*, 73 Ill. 360.

CARRIERS — SHIPMENT OF CONCEALED VALUABLES WITHOUT NOTICE. — Valuable books were concealed in a bale, designated in the bill of lading as "worn clothing," and the bale was lost in transit. *Held*, that the shipper is guilty of fraud, destroying his claim to recover the value of the books, but that he can recover for the loss of the clothing. *The Saint Cuthbert*, 97 Fed. Rep. 340 (Dist. Ct. N. Y.).

The result reached is in accord with all the authorities on the point. *Chicago & Alton R. R. Co.* v. *Shea*, 67 Ill. 471. However, the reasoning of the case seems untenable. If, as is said, the fraud of the shipper caused the loss of the bale by lessening the care of the carrier, the carrier should not be held liable for the loss either of the books or of the clothing. On the other hand, if the fraud did not cause the loss of the bale, it was wholly immaterial. The case, however, can be supported on the ground that, while the carrier was clearly a bailee of the clothing, he did not consent to take possession of the books, and therefore was not liable as a carrier for their loss. *Regina* v. *Finlayson*, 3 N. S. W. Rep. 301; *Merry* v. *Green*, 7 M. & W. 623.

CONSTITUTIONAL LAW — ASSESSMENTS — LOCAL PUBLIC IMPROVEMENTS. — *Held*, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially benefited. *Walsh* v. *Barron*, 55 N. E. Rep. 164 (Ohio). The courts generally laid down the rule stated in the present case, but they differ greatly in its application. The better view is that, although the property should be taxed only to the amount that it is specially benefited, that amount is primarily a question for the legislature, to be reviewed by the courts only when the assessment is so excessive as to be beyond the bounds of reason. *Spencer* v. *Merchant*, 100 N. Y. 585; 2 Dill. Mun. Cor. § 761. In a few jurisdictions the question is treated as belonging to the judiciary in the first instance, and an assessment by the legislature will be reversed if in the opinion of the court, it is more than the actual benefit conferred, although not necessarily so excessive as to be unreasonable. *Norwood* v. *Baker*, 172 U. S. 269; *State* v. *Newark*, 37 N. J. Law, 415. Though the decision in the present case does not distinctly state the view it follows, it would seem from the language that the latter doctrine is preferred, and hence, while the result reached is correct, the reasoning is open to criticism.

CONSTITUTIONAL LAW — POLICE POWER — CLASS LEGISLATION. — The Colorado legislature passed an act forbidding laborers to work in underground mines and smelters more than eight hours a day. *Held*, that the act is unconstitutional, as being class legislation. *In re Morgan*, 58 Pac. Rep. 1071 (Colo.).

It would seem to be no objection to a legislative act to say that it is "class legislation," — an expression without any historical significance in the law. It is not seriously contended that the act in question violates any special provision of the Colorado constitution, but that it is not a proper exercise of the "police power," which is conceived of as a distinct head of legislative power capable of somewhat exact definition, under which alone the act can be justified. In truth, the only question for the court was whether the legislation could be considered the process of law, which depends upon whether the legislature acted arbitrarily in its restraint of individual rights. *Hurtado* v. *California*, 110 U. S. 516. The expediency of particular legislation is for the legislature. The judicial question is whether the legislature, in its determination of what the public wel-

fare requires, has gone beyond the bound of reason, and not what the court, sitting as legislators, might have thought proper. *Powell* v. *Pennsylvania*, 127 U. S. 678.—Subjected to this test, it must be said that the act in question is constitutional. *Holden* v. *Hardy*, 169 U. S. 366. An omission to observe the exact nature of the judicial inquiry in cases of this kind has resulted in a large number of decisions which, in any proper view, must be regarded unsound. *State* v. *Loomis*, 115 Mo. 307.

CONTRACT — ALLOTMENT OF SHARES — WITHDRAWAL OF APPLICATION. — A letter withdrawing an application for shares in a stock company was received by the company after the allotment of the shares, but before the notice of allotment was mailed. *Held*, that the applicant is entitled to have his name removed from the register of shareholders and his deposit returned. *Re London & Northern Bank Limited*, 81 L. T. Rep. 512. See NOTES.

CONTRACTS — CONTINUING OFFER — REVOCATION. — The plaintiff made a proposal to the defendant, assented to by the latter, to furnish crushed stone at a certain price for two months "in such quantities as may be desired." After filling a few orders, the plaintiff refused to furnish any more stone. In an action for the price of that already furnished, *held*, that the defendant has no counter-claim for the plaintiff's default. *Hoffman* v. *Maffioli*, 80 N. W. Rep. 1032 (Wis.).

The result reached in the principal case is doubtless correct, and is in accord with the weight of authority. *Great Northern Ry. Co.* v. *Witham*, L. R. 9 C. P. 16; *Chicago, etc. Ry. Co.* v. *Dane*, 43 N. Y. 240; *Thayer* v. *Burchard*, 99 Mass. 508. The court seems, however, inclined to follow the reasoning of a Minnesota case, *Bailey* v. *Austrian*, 19 Minn. 535, and hold that, although there was a promise on either side, no contract was made, since the plaintiff did not absolutely undertake to do anything at all. The more correct ground for supporting the result is that the defendant, by assenting to the proposition of the plaintiff to furnish stone "in such quantities as may be desired," did not put himself under any obligation to the plaintiff to order from him any stone which he might use. Hence there were no mutual promises, and the plaintiff's proposition was merely a continuing offer revocable at any time. Until revoked, the separate orders of stone were separate acceptances of the offer, making a series of bilateral agreements.

CRIMINAL LAW — WHAT CONSTITUTES ASSAULT. — On evidence that, during a scuffle, the accused drew from his pocket a pistol which caught in his coat, the jury convicted him of assault with intent to kill. *Held*, that the verdict is not supported by the evidence. *Burton* v. *State*, 34 S. E. Rep. 286 (Ga.).

That immediate injury should be threatened is necessary to constitute an assault. *Stephens* v. *Myers*, 4 C. & P. 349. On the question of fact as to whether the injury threatened by the mere drawing of a pistol is immediate or not, it seems that the jury might well find either way, according to the circumstances of the case. The principal case, in holding that such an act is never more than mere preparation, draws a conclusion with an absoluteness that neither the facts nor the authorities justify. *State* v. *Sullivan*, 43 S. C. 205; *State* v. *Church*, 63 N. C. 15; *People* v. *McMakin*, 8 Cal. 547. It is not, however, without support. *Lawson* v. *State*, 30 Ala. 14.

EVIDENCE — ADMISSIONS — DECLARATIONS AGAINST INTEREST. — In an action by the widow for the death of her husband, *held*, that the statements of the deceased, tending to show that his injuries were received as the result of his own actions, are admissible. *Fitzgerald* v. *Georgia R. R., etc. Co.*, 34 S. E. Rep. 316 (Ga.).

The court admits the evidence upon two grounds, holding the statements to be either admissions by one who is a privy in law with a party to the suit, or else declarations of a third party against his own interest. The decision can hardly be supported on either ground. Admissions are only good against the declarant, or those identified in interest with him. Greenl. Ev. 16th ed., § 171; *Spargo* v. *Brown*, 9 B. & C. 935. The principal case might come within this rule if the plaintiff took her claim from her husband, but the act gave her an entirely new cause of action. Accordingly, she should be unaffected by any admission of her husband. As to the second ground, the court based its decision on a statute, which, however, seems to be merely declaratory of the common law rule that the declaration of a deceased person against his pecuniary interest is admissible. *The Sussex Peerage Case*, 11 Cl. & F. 85; *Mahaska Co.* v. *Ingalls*, 16 Iowa, 81. While the declarations in this case were in a sense against the pecuniary interest of the deceased, such interest, being purely contingent, seems on established grounds too remote to bring them within the exception. *Smith* v. *Blakey*, L. R. 2 Q. B. 326. See, however, in accord with the principal case on the latter point, *Walker* v. *Brantner*, 59 Kan. 117.

EVIDENCE — COLLATERAL ISSUES — TENDENCY TO CONFUSE JURY. — *Held*, that the court will exclude evidence, though logically relevant, which has a tendency to confuse the jury and to protract the trial beyond reasonable limits. *Golden Reward Mining Co.* v. *Buxton Mining Co.*, 97 Fed. Rep. 414 (C. C. A., Eighth Cir.).

The case lays down the correct, though often neglected, rule. The admissibility of such evidence depends upon whether, in the opinion of the trial judge, a clear inference can be drawn without going into such details as would confuse the jury and unnecessarily protract the case. *Emerson* v. *Lowell Gas Light Co.*, 85 Mass. 410; *Temperance Hall Ass'n* v. *Giles*, 33 N. J. Law, 260. Some courts, however, neglect this rule, and admit such evidence without question. *House* v. *Metcalf*, 27 Conn. 631; *Calkins* v. *City of Hartford*, 33 Conn. 57.

EVIDENCE — DYING DECLARATIONS — QUESTION FOR COURT. — In a prosecution for homicide, the declarations of the deceased were offered in evidence. *Held*, that the declarations and the evidence as to the circumstances under which they were made may be left in the first instance to the jury, with instructions to disregard the declarations if not made in fear of approaching death. *Bush* v. *State*, 34 S. E. Rep. 398 (Ga.).

The principal case represents the settled rule in the state of Georgia. *Mitchell* v. *State*, 71 Ga. 128. The entire weight of authority is, however, *contra*. *People* v. *Smith*, 104 N. Y. 491; *Westbrook* v. *People*, 126 Ill. 81; *Regina* v. *Hucks*, 1 Stark. 521. The usage seems on principle incorrect. In such cases there are always two questions: first, the admissibility of the declaration, and, second, the credence to be given it. The former is always a question for the court, and the latter for the jury. 1 Greenl. Ev., 16th ed., § 161 b. To be sure, the jury have the power to disregard the declarations as being unworthy of belief when the question is once before them, but it is the duty of the court to decide in the first place that the declarant was apprehensive of death when he made the statements, since on that their admissibility depends. *State* v. *Norton*, 121 Mo. 537.

EVIDENCE — NEGLIGENCE — RESULTS IN SIMILAR CASES. — In an action against a railroad for damages caused by an engine emitting sparks, the engine complained of being identified, *held*, that evidence of other engines of the defendant emitting sparks on other occasions is not admissible. *Missouri, etc., Ry. Co.* v. *Wilder*, 53 S. W. Rep. 490 (Ind. Ter.). See NOTES.

EVIDENCE — OPINION — HYPOTHETICAL QUESTIONS. — Experts were asked whether assuming the evidence to be true, the defendant was, in their opinion, insane. Many witnesses had been examined, and the testimony was voluminous, although not contradictory. *Held*, that the question was a proper one. *Cornell* v. *State*, 80 N. W. Rep. 745 (Wis.).

The Wisconsin court holds such a question improper where the evidence has been contradictory, on the ground that it allows the expert to usurp the function of the jury. *Bennett* v. *State*, 57 Wis. 69. The soundness of such reasoning may be doubted, since the jury are not bound to accept the opinion of the expert. *United States* v. *McGlue*, 1 Curt. C. C. 1. The true objection to the question when the evidence is contradictory lies in the danger that the expert may not find the facts as the jury does, and that therefore his conclusion may be drawn from different premises, and so worthless or misleading. The same sort of objection might be urged against the question in the principal case. It is possible that the expert may not remember fully all the facts, or that he may not recall them as the jury does. Although it seems better on these grounds to exclude such questions under the circumstances of the principal case, they are sometimes allowed. *State* v. *Hayden*, 51 Vt. 304.

EVIDENCE — PREVIOUS WRONGFUL ACTS. — In a proceeding against a bank president for making false reports to the comptroller, in order to mislead the authorities as to the bank's financial standing, evidence that he had made a similar false report four months before was offered. *Held*, that it is admissible on the question of the intent with which the later false reports were made. *Bacon* v. *United States*, 97 Fed. Rep. 35 (C. C. A., Eighth Cir.).

Testimony as to former wrongful acts of a defendant is in general inadmissible. *Commonwealth* v. *Jackson*, 132 Mass. 16. Such evidence is, however, admitted to prove intent, where it can be shown that all the acts are part of a general scheme. *Commonwealth* v. *Robinson*, 146 Mass. 571. The principal case is a weaker one than that, however. It must, then, be a practical question for the trial court as to whether the probative quality of such testimony is strong enough to demand its admission, notwithstanding the prejudice against the accused it is likely to arouse in the minds of the jury. 1 Greenl. Ev., 16th ed., § 14 a. Since, then, the admission of such evidence is dis-

cretionary with the trial judge, his ruling ought not to be revised, unless it appears that the result could not have been reasonably reached. On this ground the upper court's refusal to reverse the judgment of the lower court seems correct.

EVIDENCE — TESTAMENTARY CAPACITY — BURDEN OF PROOF. — Section 2653 a of the New York Code of Civil Procedure enacts that the probate of a will shall be *prima facie* evidence of its validity. *Held*, that, after the will is admitted to probate, the clause casts the burden of establishing the testamentary incapacity of the testator upon the contestant. *Dobie* v. *Armstrong*, 160 N. Y. 584. See NOTES.

GARNISHMENT — FUNDS IN HANDS OF COURT. — After satisfaction of judgment from the proceeds of an attachment sale, a surplus remained in the hands of the clerk of the court. *Held*, that this surplus cannot be garnished. *Allen* v. *Gerard*, 44 Atl. Rep. 592 (R. I.).

Generally, funds in the hands of an officer of the court cannot be garnished. There is, however, a direct conflict of authority when, as in the principal case, the final disposition of the fund is determined. It has been held that such a fund can be garnished. *Wilbur* v. *Flannery*, 60 Vt. 581; *Dunsmoor* v. *Furstenfeldt*, 88 Cal. 522; *Weaver* v. *Davis*, 47 Ill. 235. But an abundance of authority, in accord with the principal case, takes the opposite view. *Lord* v. *Collins*, 79 Me. 227; *Pace* v. *Smith*, 57 Tex. 555; *Tremper* v. *Brooks*, 40 Mich. 333. The sole duty of the clerk of the court is to hold the funds for the court, and therefore garnishment of such funds is really a proceeding against the court. Public policy and the orderly administration of justice require that the court be approached by petition, and not by mandatory proceedings, and hence the principal case is to be supported.

PERSONS — INFANTS' CONTRACTS — RECOVERY OF CONSIDERATION. — The plaintiff, an infant, agreed to purchase a bicycle on instalments. She used it three months and then returned it, demanding the money she had paid. *Held*, that the plaintiff cannot recover. *Rice* v. *Butler*, 53 N. E. Rep. 275 (N. Y.).

This decision reverses the decision in the lower court, 12 HARV. LAW REV. 63. It is *contra* to the American cases directly in point, *McCarthy* v. *Henderson*, 138 Mass. 310, *Whitcomb* v. *Joslyn*, 51 Vt. 79, but in accord with the English decisions. *Valentini* v. *Canali*, 24 Q. B. D. 167. And several American cases, which quote the English cases with approval, are indistinguishable in principle. *Johnson* v. *Northwestern, etc. Ins. Co.*, 56 Minn. 365. The result reached is desirable, for the protection of the infant is not interfered with, while he is forbidden to use his infancy to defraud. It has been objected to this view that it allows recoupment, where the infant would have a good defence to an action for the price, and so practically holds him on his contract. The principal case overcomes this objection on the ground, that to the extent that the amount paid equals the benefit the infant has received under the contract, the contract is executed and reasonable, and therefore the infant cannot recover, because he cannot return the consideration. The reasoning seems sound, and the result is surely to be commended.

PROCEDURE — JUDGMENTS — SET-OFF AFTER ASSIGNMENT. — A statute provided that, after the assignment of a contract, no claims upon such contract should be set off against the assignee, unless they were in existence at the time of the assignment. The plaintiff is the assignee of a contract on which the defendant had a claim for damages against the assignor. *Held*, that a judgment on this claim obtained subsequent to the assignment may be set off against the plaintiff. *Bacon* v. *Reich*, 80 N. W. Rep. 278 (Mich.).

It is clear that at the time of the assignment the plaintiff's claim was subject to the defendant's right to recoup his damages, since the assignee of a chose in action has no better rights than his assignor. *Young* v. *Kitchin*, L. R. 3 Ex. D. 127. The plaintiff claims, however, that no set-off should be allowed against him in this action, since the judgment, which came into existence after the assignment, is barred by the statute, and the claim for damages no longer exists, having merged in the judgment. This objection, if allowed, would have resulted in obvious injustice to the defendant, and is based on a pure technicality. *Clark* v. *Rowling*, 3 N. Y. 216; *Second Nat. Bank* v. *Townsend*, 114 Ind. 534. The statute is hardly intended to prohibit the set-off of a claim in existence at the time of the assignment, but which has subsequently been changed in form.

PROPERTY — CONDITIONAL SALE — RIGHTS OF ADMINISTRATOR. — The decedent, a retailer, purchased part of his stock in trade under an agreement that the title should remain in the vendor until payment. At his death he was insolvent, and his adminis-

trator, without knowledge of the terms of the contract, sold the goods in question. *Held*, that the vendor is not entitled to recover the full value of the goods thus sold, but must come in with the general creditors. *In re Osburn's Estate*, 58 Pac. Rep. 521 (Oreg.).

In this class of transactions, the intention manifestly is that the vendee shall treat the goods as he does the rest of the stock, and there is, therefore, implied in the transaction a power to sell in the usual course of business. *Spooner* v. *Cummings*, 151 Mass. 313. But it seems that the decedent himself would not have had a right to sell, knowing he was insolvent, as this would not be within the terms of the power, which applies only to the usual course of a solvent business. The administrator succeeds to the contract rights of the decedent, *Woods* v. *Ridley*, 27 Miss. 119, but his duty is only to close up the business of the decedent. *Walls* v. *Walker*, 37 Cal. 424. Accordingly, any such sale by him for the benefit of an insolvent estate, or, indeed, any sale, whether the estate is insolvent or not, would be outside the terms of the power to sell in the regular course of business. The fact that the administrator acted without knowledge of the terms of the contract is, therefore, immaterial, and the vendor in the principal case should have recovered the value of the goods.

PROPERTY — COPYRIGHT — SHORTHAND REPORTS. — The plaintiff brought an action to restrain the defendant from selling a book which contained public speeches taken from shorthand reports published in the plaintiff's newspaper. *Held*, that the plaintiff can claim no copyright in such reports. *Walter* v. *Lane*, 68 L. J. Ch. 736. See NOTES.

PROPERTY — COVENANT TO FENCE — EASEMENT. — In a conveyance of the fee, the grantor covenanted to build and maintain a fence, or not to hold the grantee liable for damages to his cattle. *Held*, that the covenant is merely personal and does not bind the grantor's heirs or assigns. *Brown* v. *Southern Pac. Co.*, 58 Pac. Rep. 1104 (Oreg.).

The statute of 32 Henry VIII., c. 34, provided that the burden should run in covenants contained in leases for life or for years, although the heirs and assigns of the grantor were not mentioned. It was early held that even then a covenant would not run with the land unless it concerned a thing in *esse*. *Spencer's Case*, 5 Co. 16 a. The result in the decision under consideration was reached by applying the distinction taken in Spencer's case between things *in esse* and not *in esse*. But this distinction is purely technical, and ought only to be applied where the question is the same as in that case. *Kellog* v. *Robinson*, 6 Vt. 276; *Fitch* v. *Johnson*, 104 Ill. 111; *Morse* v. *Aldrich*, 36 Mass. 449 (*semble*). The decision of the principal case is more properly supported on another ground. If the parties intended by this covenant to create an easement, mention of the grantor's heirs and assigns is not essential. *Lathrop* v. *Elsner*, 93 Mich. 599. But the omission of these words is a material circumstance in determining what intent the parties actually had. It seems, therefore, a reasonable construction to say that the grantor intended a personal covenant rather than an easement.

PROPERTY — EXECUTORS — LIABILITY OF SURETIES. — A statute provided that debts due from an executor to his testator should be assets of the estate, to be accounted for in the same manner as debts due from strangers. The defendants were sureties on the bond of an executor who was indebted to the estate, and had been insolvent during the whole period of administration. *Held*, that they are liable for the face value of the debt, without regard to his insolvency. *Judge of Probate* v. *Sulloway*, 44 Atl. Rep. 720 (N. H.).

The decision proceeds upon the theory that the statute makes the executor liable to account for the amount of the debt as so much money belonging to the estate. The statute, however, designates the chose in action as the asset, and it is difficult to see on what principle it is held to make the executor accountable in his official capacity for more than the actual value of the debt; and the obvious injustice of charging the sureties of an executor with the face value of a worthless obligation, simply because the executor happens to be also the debtor, is clear. The question is a new one in New Hampshire, and the solution of it in the principal case finds no support in other jurisdictions, where the inability of the executor to pay his personal debts appears always to have been considered a defence in an action against his sureties. 2 Woerner, Administration, § 512; *McCarty* v. *Frazer*, 62 Mo. 263; *Lyon* v. *Osgood*, 58 Vt. 707; *Baucus* v. *Barr*, 45 Hun 582.

PROPERTY — RULE AGAINST PERPETUITIES — RESTRAINT ON ALIENATION. — In an ordinary real estate trust association, with tranferable shares, the trustees could sell only with the consent of three quarters of the stockholders. *Held*, that the trust is not void. *Howe* v. *Morse*, 55 N. E. Rep. 213 (Mass.). See NOTES.

PROPERTY — WILLS — EXECUTION IN PRESENCE. — Witnesses signed a will in the same room with the testator. He could see them, but was not in a position to see the paper itself. *Held*, that the will is not duly executed. *Burney* v. *Allen*, 34 S. E. Rep. 500 (N. C.).

The court relied on an earlier case in which the circumstances were the same, except that the witnesses were in another room. *Graham* v. *Graham*, 32 N. C. 219. Even granting the doubtful soundness of that decision, *Riggs* v. *Riggs*, 135 Mass. 238, it can hardly justify the determination in the principal case. The question being one of physical presence, it has been fully established that that requisite is fulfilled if the witnesses are in the same room as the testator at the time of execution, and the latter is not physically unable to move. Such, indeed, is the common sense of the matter. *Newton* v. *Clarke*, 2 Cur. Ecc. 320; 1 Jar. Wills, 89. An attestation like that in question has, in fact, been held sufficient in North Carolina. *Bynum* v. *Bynum*, 33 N. C. 632. The principal case is indistinguishable from that last cited, and it might better have been followed than the earlier North Carolina case.

QUASI-CONTRACTS — RECOVERY OF MONEY PAID TO SECOND ASSIGNEE OF CHOSE IN ACTION. — The defendant had taken as collateral security an assignment of a bond and mortgage given by the plaintiff. The plaintiff paid the assignee, and the securities were cancelled, both parties being in ignorance of a previous recorded assignment. The plaintiff, having been compelled to pay the prior assignee, sued to recover the money paid to the defendant. *Held*, that he cannot recover. *Behring* v. *Somerville*, 44 Atl. Rep. 641 (N. J., C. A.).

This decision appears to be based on the familiar principle that as between two parties having equal equities, one of whom must suffer, the loss should lie where it has fallen. *Price* v. *Neal*, 3 Burr. 1354; *Merchants' Insurance Co.* v. *Abbott*, 131 Mass. 397. It would seem, however, that the rule could not properly be applied in this case. The legal title to the securities was in the prior assignee by virtue of his assignment, and their cancellation clearly amounted to a conversion. The defendant, therefore, however innocent he was, having obtained the sum in controversy by an unlawful use of the prior assignee's property, held it as constructive trustee for him. It follows that the plaintiff should have recovered, since he had been forced to pay the prior assignee, and was thus subrogated to his rights against the defendant. The most familiar application of this rule is found in the cases where the maker of a note or the drawee of a bill, who has paid one who holds under a forged indorsement, is allowed to recover from the victim of the forgery. *Star Insurance Co.* v. *New Hampshire Bank*, 60 N. H. 442; *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 74; 4 HARV. LAW REV. 297, 307.

TORTS — NEGLIGENCE — PROXIMATE CAUSE. — The defendant negligently set fire to the forest land of his neighbor, whence it spread and damaged the plaintiff's land beyond. *Held*, that the plaintiff cannot recover, as the injury was not the proximate result of the defendant's negligence. *Hoffman* v. *King*, 55 N. E. Rep. 401 (N. Y.). See NOTES.

TRUSTS — CONSTRUCTIVE TRUSTS — SERVANT OF TRUSTEE. — The defendant was a servant of the trustee of the plaintiff, and wilfully misapplied the trust funds which were in his hands. *Held*, that he is not personally liable, since a servant cannot have possession. *Hodgson* v. *St. Paul Plow Co.*, 80 N. W. Rep. 956 (Minn.).

This decision seems indefensible. It is true that an agent or servant of a trustee is generally only accountable to his employer, and is under no obligation to the *cestui* merely because he has in his hands funds belonging to the latter. *Keane* v. *Robarts*, 4 Mad. 322; *Tyler* v. *Tyler*, 3 Beav. 550; *Gray* v. *Johnson*, 3 App. Cas. 1. But the court in the principal case has entirely overlooked the rule that such a servant or agent can by his own wrongful act make himself a constructive trustee for the *cestui*. *Re Barney* [1892] 2 Ch. D. 265; *Lee* v. *Sankey*, L. R. 15 Eq. 204. It is on this ground that the defendant's servant should clearly, in all jurisdictions, be held personally liable. Lewin, Trusts, 10th ed., 205.